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Supreme Court of the United States

October Term, 1969

No. 45 C

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The National Association of Regulatory Utility Commissioners, your Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 3067), is not yet officially reported, but is reprinted in the Appendix of this Petition (A. 1). The Decision and Order of the Federal Communications Commission (R. 2853) in this cause is officially reported at 13 FCC 2d 448, and is also reprinted in the Appendix to this Petition (A. 30). Pursuant to Rules 12(4) and 21 of this Court, the Petitioner hereby adopts the transcript of the record filed with the Court in *General Telephone Company of California, et al., v. Federal Communications Commission, et al.*, No. 357, October Term, 1969, since the petitioners there seek review of the same judgment.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Decision and Order of the Federal Communications Commission, was entered on April 30, 1969 (R. 3095; A. 27). Upon motion of the Petitioner, Associate Justice Byron R. White on July 25, 1969, entered an order extending the time for filing this Petition to and including August 8, 1969.

The jurisdiction of the Court is invoked under 28 U.S.C., Sec. 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

A. Whether the Decision and Order of the Federal Communications Commission, upheld below by the Court of Appeals, unlawfully extends the Commission's jurisdiction into areas primarily of local concern and reserved for State and local regulation by Title II of the Communications Act of 1934, as amended.

B. Whether the Decision and Order of the Federal Communications Commission, upheld below by the Court of Appeals, violates Title II of the Communications Act of 1934, as amended, by requiring a common carrier telephone company to obtain the prior approval of the Commission for the construction, extension, or operation of a line which will be located entirely within a single state and within a local telephone exchange service area, and which will not exceed ten miles in length.

STATUTORY PROVISIONS INVOLVED

Section 2(b) of the Communications Act of 1934, as amended (47 U.S.C., Sec. 152), provides in pertinent part that:

> Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier. . .except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Section 3 of the Communications Act of 1934, as amended (47 U.S.C., Sec. 153), provides in pertinent part that:

> For the purposes of this Act, unless the context otherwise requires——. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. . . .

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

(s) "Telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(u) "Connecting carrier" means a carrier described in clause (2), (3), or (4) of section 2(b).

(v) "State" includes the District of Columbia and the Territories and possessions. . . .

Section 214(a) of the Communications Act of 1934,

as amended (47 U.S.C., Sec. 214(a)), provides in pertinent part that:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length. . . . As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Section 221(b) of the Communications Act of 1934, as amended (47 U.S.C., Sec. 221(b)), provides that:

> Subject to the provisions of section 301, nothing in this Act shall be construed to apply,

or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

STATEMENT

Your Petitioner, the National Association of Regulatory Utility Commissioners, hereinafter referred to as the "NARUC", was founded in 1889, and has within its membership the governmental bodies of the fifty States engaged in the regulation of carriers and public utilities. Its chief objective is to serve the public interest by seeking to improve the quality of government regulation.

The NARUC here seeks review of the Decision of the United States Court of Appeals for the District of Columbia Circuit which affirmed the Decision and Order adopted by the Federal Communications Commission on June 25, 1968, requiring that a telephone company common carrier obtain a certificate of public convenience and necessity from the Commission under Section 214 of the Communications Act of 1934, as amended, prior to the construction of distribution facilities to provide channel service to community antenna television (CATV) systems.

A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplifies the signals and distributes such signals by coaxial cable to

the premises of its subscribers who pay a fee for the service. The system consists of a number of connecting sections which may be characterized as the reception, headend, and distribution systems.

At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is located in a building adjacent to the tower.

The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber.

In some instances the distribution system is provided by the CATV owner who either constructs all of the necessary facilities or strings his cable on the poles of a utility company for which a rental fee is paid pursuant to a pole line attachment arrangement. In other cases, the telephone company serving the CATV community provides the channel service transmission system. While in some instances the telephone company provides the headend equipment, it generally provides service only from the headend to the premises of the subscriber.

This case is concerned only with channel service offerings by telephone companies to CATV systems, not with the distribution system constructed by the CATV owner

or provided pursuant to pole line attachment arrangements.

The Commission in instituting the adjudicatory proceeding below (Docket No. 17333) named operating telephone companies of the American Telephone and Telegraph Company, General Telephone and Electronics Service Corporation, and United Utilities, Inc., as respondents, and posed the issue of whether these companies are subject to Section 214 of the Act with respect to the construction of facilities for offering channel service to CATV systems.

The NARUC intervened in the proceeding in an effort to protect State jurisdiction over activities of telephone companies which are primarily of local concern and subject to adequate State and local regulation.

During the hearings before the Commission, it was determined that in no case where channel service is furnished by a Bell or General System company do the facilities cross State lines; nor in any case is a subscriber located as much as ten airline miles from the headend of the CATV system serving him. Only one "connecting carrier" in the United System provides channel service to a CATV system having a subscriber living more than ten airline miles from the headend, but such service is provided solely within a single State. Only one "fully subject" carrier in the United System provides channel service across a State boundary, but each subscriber to such service resides within ten airline miles of the headend system. (R. 527, 534, 545-51, 894-934, 939).

Thus, the services in question are either provided solely within a single State, provided by a "connecting carrier", provided to subscribers all of whom are located within ten air miles of the headend, or are subject to all three of these characterizations.

Accordingly, the NARUC contended before the Commission that the CATV channel service facilities located entirely within a single State were reserved to State jurisdiction by Section 2(b)(1) of the Act which exempts from Commission jurisdiction, under the circumstances of this case, "... facilities... for or in connection with intrastate communication service by wire or radio of any carrier...". In interpreting this provision, the NARUC relied on *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170, 80 L.Ed. 1130 (1936), and similar cases involving the Interstate Commerce Act—the progenitor of the Communications Act. These cases held that common carrier transportation of a product entirely within a single State cannot be combined with prior or subsequent non-common carrier transportation of the product across a State boundary so as to bring the transportation within the jurisdiction of the Interstate Commerce Commission. By analogy, the NARUC insisted that common carrier service wholly within a single State, when there is no common carrier transmission across a State boundary, is "intrastate service" within the meaning of the Communications Act since under the rationale of the above cases the interstate non-common carrier broadcast signals cannot be combined with the common carrier service for the purpose of establishing Commission jurisdiction.

The NARUC further contended that the facilities in issue were exempt from Commission certification under Section 214 by virtue of the proviso therein stating in part that "no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length...".

Moreover, the NARUC, relying on *In re Capital City Telephone Company*, 3 FCC 189 (1936), contended that

the telephone companies of the General and United Systems classified as "connecting carriers" within the meaning of Section 2(b)(2) and 3(u) of the Act were, by virtue of such status, exempt from the certification requirements of Section 214.

In essence, the NARUC contended that Title II of the Act (unlike Title III which reserves radio and television broadcasting for exclusive regulation by the Commission), clearly divides regulatory responsibility over our nationally integrated telephone system between the Commission, on one hand, and State and local governments on the other. The Congress in Title II of the Act fashioned a Federal-State partnership whereby the bulk of telephone plant and the vast majority of telephone calls were reserved to State and local jurisdiction. This partnership has been one of the most successful intergovernmental relationships in our history as evidenced by the excellent telephone service which the public receives at reasonable rates. Accordingly, the NARUC urged the Commission to apply the Federal-State partnership concept to telephone company plant used for providing CATV service and to afford the above enumerated provisions of the Act the same efficacy for this newly emerging CATV service as had long been applied to other forms of telephone service.

Nevertheless, the Commission rejected the contentions of the NARUC and held in its Decision and Order, *inter alia*:

(a) That the telphone company respondents, "fully subject" to the Communications Act of 1934, are required to obtain certificates pursuant to Section 214 prior to constructing facilities to provide channel service to CATV operators; and

(b) That the telephone company respondents, classified as "connecting carriers" under Section 2(b)(2) of

the Communications Act, are also required to obtain such certificates pursuant to Section 214 prior to constructing such facilities, and that the Commission's earlier decision in *In re Capital City Telephone Company*, 3 FCC 189 (1936), was overruled to the extent of its inconsistency with the Order.

On July 15, 1968, the Bell, General, and United respondents filed notices of appeal from the Commission's Order with the Court of Appeals for the District of Columbia Circuit, and on July 18, 1968, the NARUC filed its petition to review the Order with such Court. Jurisdiction of the NARUC's petition to review was vested in the Court of Appeals by Section 402(a) of the Communications Act of 1934 (48 Stat. 1093, 47 U.S.C., Sec. 402(a)), as amended, and the Judicial Review Act (Public Law 89-554; 80 Stat. 622; 28 U.S.C., Secs. 2342 and 2344).

Upon motion by the Commission, the Court of Appeals by *per curiam* order filed August 21, 1968, consolidated the four appeals of the telephone company respondents (Case Nos. 22,106, 22,112, 22,113, and 22,116) and the NARUC's petition for review (Case No. 22,143).

The NARUC reasserted its contentions before the Court of Appeals, but it affirmed the Decision and Order of the Commission in totality.

In its opinion, the Court of Appeals placed major reliance on *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L.Ed. 2d 1001 (1968), which upheld the authority of the Commission under Title III of the Communication Act to regulate the carriage and non-duplication of television signals by CATV systems in order to prevent a severe disruption of the television broadcasting industry. The illicit injection of Title III rationale into the interpretation of Title II is further

reflected by the observation of the Court of Appeals that:

> As we view the record now before us and consider it in light of our own holdings and the relevant holdings of the Supreme Court it seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication. The Supreme Court aptly characterized the functional aspect of the CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication. (A. 19).

REASONS FOR GRANTING THE WRIT

This case presents to the Court for decision a monumental issue which will vitally affect the future course of Federal-State relations with respect to the regulation of telephone companies under Title II of the Communications Act. The Court is here called upon to engage in a delicate exercise of its responsibilities under the Constitution by weighing, in the light of Title II, the competing regulatory claims of the Federal and State governments over facilities within the reach of the Commerce Clause but primarily of local concern.

In this case, the Commission has moved beyond issuing regulations under Title III governing the carriage and

non-duplication of television programs by CATV systems, and has, by emasculating exemptions under Title II, sought to prescribe how, when and where the telephone companies will construct facilities to carry these programs in even the smallest communities of the Nation. Congress did not intend, nor does the public interest require, that the Commission, within the circumstances of this case, be judicially permitted to literally transform itself into the "Town Council of America." Surely the limited resources of the Commission can be better used in the public interest by focusing them upon national and international problems which are beyond the competence of State and local regulation to solve, rather than dissipating these resources in an effort to regulate telephone company construction of CATV facilities along the streets and byways of America.

With these broad observations in mind, we will now review the specific legal points involved.

I

CONGRESSIONAL POLICY, AS REFLECTED BY THE COMMUNICATIONS ACT, REQUIRES THE PRESERVATION OF STATE JURISDICTION OVER INTRASTATE COMMUNICATIONS AND OVER INTERSTATE AND FOREIGN COMMUNICATIONS PRIMARILY OF LOCAL CONCERN.

When Congress enacted the Communications Act in 1934 the telephone industry, as it is today, was deeply involved in interstate commerce. AT&T President Gifford, in testifying on March 13, 1934, before the Senate Committee on Interstate Commerce on S. 2910, a bill proposing the Act, stated that:

> There are interconnected in the United States approximately 16,600,000 telephones,

> of which 13,163,000 are Bell telephones, the balance being owned by over 6,000 connecting telephone companies and 25,000 connecting rural telephone lines. Telephone service is available to subscribers and nonsubscribers through public telephones, so that today practically anyone anywhere can speak with anyone else anywhere else any time of the day or night.[1]

Later on in his testimony, President Gifford stated that "every telephone, and hence every telephone circuit, is an interstate telephone and circuit, to which the Federal power reaches because they are instrumentalities of interstate commerce."[2]

Undoubtedly, Congress in 1934, through the exercise of its broad powers under the Commerce Clause,[3] could have totally preempted the regulation of the telephone industry because generally the same facilities were used, as they are today, for both interstate and intrastate communication.

However, Congress chose to preserve state regulation over intrastate communications and over interstate and foreign communications primarily of local concern. Congressional deference for state and local regulation is clearly evidenced by several provisions of the Act, some of which will be considered in greater detail later.

Section 2(b)(1) of the Act, subject to the radio licensing provisions of Section 301, prohibits Commission ju-

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[1] Hearing record, p. 75, 4th par.

[2] *Id.*, p. 89, 2d par.

[3] Constitution, Art. I, Sec. 8, Cl. 3.

risdiction over intrastate communications,[4] thereby precluding application of the *Shreveport Doctrine. Houston, E. & W. T. Ry. Co. v. United States* (1914), 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833.

Section 2(b)(2)(3)(4), largely preserves state jurisdiction over "connecting carriers"[5] irrespective of their engagement in interstate or foreign communication through interconnection with nonaffiliated carriers.[6]

Section 3(e), in defining the terms "interstate communication" and "interstate transmission" as they relate to Title II, excludes therefrom "wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.".

Paragraph (h) of Section 213 provides that nothing in that Section, relative to Commission valuation of carrier property, "shall impair or diminish the powers of any State Commission.".

Section 214, requiring certificates of public convenience and necessity for construction, acquisition or operation of lines, exempts from certification (1) lines within a single state which are not part of interstate lines, (2) local, branch or terminal lines not exceeding ten miles in

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4 Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., p. 3.

5 Defined in Section 3(u) of Act.

6 Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., pp. 2 and 4.

length, and (3) lines acquired through consolidation of common carriers. Consequently, these exempted facilities are reserved for state regulation.

Section 220, relating to accounting and depreciation matters, authorizes the Commission to exempt various classes of carriers from the requirements of the Section in cases where the carriers would be subject to state commission regulation (Par. (h)), and requires the Commission to consult with state commissions in administering the Section (Par. (i)), and further requires the Commission to report to Congress any need for legislation to harmonize federal-state regulatory efforts involving the subject matter of the Section (Par. (j)).

Section 221(a), relating to consolidation of telephone companies, requires that state commissions be notified of proposed consolidations and that they be given an opportunity to be heard. The Section states that nothing therein "shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies."

Section 221(b) provides that the Commission shall not have jurisdiction with respect to charges or facilities in connection with wire, mobile, or point-to-point radio telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign communication" in any case where such matters are subject to state or local regulation.

Section 410 provides for Commission use of state joint boards and federal-state joint hearings in administering the Act, and for consultation between the Commission and the state commissions, and for other cooperative endeavors.

These provisions of the Act have resulted, as we shall hereinafter document, in the bulk of telephone plant and

the vast majority of telephone calls being reserved for State and local jurisdiction.

Also, these provisions of the Act clearly demonstrate that Congress intended to commit to the Commission the regulation of matters beyond the ability of the States to individually regulate, and to preserve state regulation in matters primarily of local concern irrespective of their involvement in interstate or foreign communication.

In ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests in the federal scheme must always be in the background.

The Commission, in its regulatory efforts affecting the CATV industry, has selected two distinct and separable jurisdictional bases in the Communications Act to accomplish two distinct and separable objectives.

The Title III Objective

The objective of the Commission under Title III of the Act is to regulate the television program market in such a manner as to prevent CATV systems from disrupting the television broadcasting industry. The Commission, relying on Section 1, 4(i), 303(f)(h)(r), 307(b) and 403 of the Act, has adopted regulations governing the carriage and nonduplication of television programs by CATV systems in an effort to achieve a proper relationship between basic broadcast service and CATV service.

The FCC, as to the first objective, is primarily concerned with the serious competitive impact of CATV services upon local broadcasting stations and the threatened economic elimination of the latter as a result of CATV duplication of the very programs upon which the local station relies for its sponsor-advertising revenues.

The FCC believes such a result would completely deprive surrounding rural populations which are not served by CATV, and such portion of the urban community population as could not afford the CATV's monthly service charges, of all television reception and, further, would deprive the whole community of important local interest programs, local projects, news, weather, etc., which are generally provided by a local broadcasting station.

With this problem in mind, the FCC has evolved a regulatory scheme employing carriage and non-duplication provisions which is designed to foster a public interest-oriented relationship between CATV companies and local broadcasting stations. These regulations clearly reflect that the FCC is primarily concerned with regulating the carriage of television programs in such a fashion as to protect the local broadcasting stations from ruinous competition from CATV systems. Such a regulatory undertaking can be best handled by the FCC. The States have no desire to enter this area.

This assertion of FCC jurisdiction was affirmed by this Court on June 10, 1968, in *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L. Ed. 2d 1001. Specifically, this Court upheld the authority of the FCC to regulate the extension of certain television signals by a CATV system.

Following a complaint, the FCC initiated proceedings pursuant to its Rule, 47 CFR, Sec. 74.1107(a), which provides:

> No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such

> extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

It was alleged that the respondent transmitted the signals of a Los Angeles television station into the San Diego area, the 54th largest television market. The FCC restricted the expansion of respondent's system pending full review of complaints received, 4 FCC 2d 612, but the Ninth Circuit Court of Appeals held that the Commission lacked such authority under the Communications Act of 1934, 47 U.S.C., Sec. 151 *et seq.* This Court reversed.

After initial determinations that it had no regulatory authority over CATV systems, 26 FCC 403, the Commission has ultimately held that it has authority under the Communications Act (1) to require CATV systems to transmit to their subscribers the signals of any station into whose service area they have brought competing signals, First Report and Order, 38 FCC 683, 716-19, and (2) to forbid the duplication of the programming of such local stations for certain periods before and after a local broadcast, *Id.* at 719-30. Finally, the Commission made the above two requirements applicable to both microwave and cable CATV systems in addition to the importation limitation set forth in the Second Report and Order, 2 FCC 2d 725.

In considering the scope of the Commission's regulatory authority under the Communications Act, this Court specifically held that "CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates ... television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible." 392 U.S. 168, last par. 20 L. Ed. 2d 1011(2).

After noting that "CATV systems are not common carriers within the meaning of the Act", 392 U.S. 169, 20 L. Ed. 2d 1011, ftn. 29, this Court held that "the Commission's authority over 'all interstate ... communication by wire or radio' permits the regulation of CATV systems." 392 U.S. 178, 1st par., 20 L. Ed. 2d 1016(14).

This Court's holding was specifically limited, however, to an approval of Commission jurisdiction "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." This Court expressed "no views as to the commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 178, 2d par., 20 L. Ed. 2d 1016(15).

This decision by this Court is entirely consistent with the position of the NARUC in this case. In *Southwestern Cable*, this Court simply upheld, in the absence of a contrary statutory prescription, the Commission's exercise of jurisdiction "reasonably ancillary" to the effective performance of its responsibilities under Title III of the Act. In no way may the case be interpreted to permit the Commission to sweep away the provisions of

Title II of the Act which reserve to the States regulatory jurisdiction over the facilities in issue here.

The Title II Objective

The objective of the Commission, which is now in issue before this Court, is to enlarge its jurisdiction under Title II of the Act over telephone common carriers by requiring them to obtain certificates pursuant to Section 214 of the Act with regard to the construction of channel service facilities for use by CATV systems.

The failure of the Commission to accomplish this objective would not impair, or be inconsistent with, its regulatory accomplishment of the Title III objective.

II

THE CERTIFICATION REQUIREMENTS OF SECTION 214 OF THE COMMUNICATIONS ACT ARE NOT APPLICABLE TO COMMON CARRIER CATV CHANNEL SERVICE FACILITIES WHEN LOCATED ENTIRELY WITHIN A SINGLE STATE OR WHEN NOT EXCEEDING TEN MILES IN LENGTH.

A. Single State CATV Channel Service Facilities

Section 214 of the Communications Act of 1934 was derived from, and is similar to, Section 1 (18-22) of the Interstate Commerce Act relating to ICC certification of the construction or extension of a "line of railroad."[7]

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[7] Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Congress, 2d Session, page 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, 73d Congress, 2d Session, page 6.

A proviso in Section 214 states that no certificate shall be required from the Commission "under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length. . .".

Since the "lines" at issue herein are located entirely within a single state and are not connected to the line of another carrier, the NARUC submits that they are exempted by clause (1) of the above proviso.

The Commission held, however, that the carriers' lines are but "links" in the interstate transmission of television signals and are therefore non-exempt "interstate lines" within the meaning of clause (1). (A. 44-48, para. 17-20).

Specifically, the Commission's argument begins with the definition of "line" found in Section 214(a): "any channel of communication . . . other than a channel of communication established by the interconnection of two or more existing channels." The Commission then concludes that since CATV operators are engaged in communication that crosses a state line, those who provide services or facilities to CATV operators are "links" in the interstate television signal transmission process and are therefore providing "interstate lines" irrespective of the character, location or function of those lines.

Although such CATV operators may distribute interstate signals to their customers, their common carrier provided facilities are not "interstate lines" within the meaning of Section 214.

In ascertaining the congressional intent regarding Section 214, we should first note that the Section must be read in conjunction with Section 2(a) which provides that the Act shall "apply to all interstate and foreign

communication by wire or radio and all interstate and foreign transmission of energy by radio . . .". Consequently, if Section 214(a) had been enacted *without* the provisos, Congress would have intended for the Commission to certificate all subject common carrier lines engaged in "interstate or foreign communication."

However, Congress did not see fit to grant such ubiquitous authority to the Commission. For this reason, it inserted the provisos in Section 214(a) to limit the sweep of its opening clause. It is *very important* to keep in mind that the lines referred to in clauses (1) and (2) of the first proviso are lines involved in "interstate or foreign communication" and that they are not lines involved in intrastate communication. If clauses (1) and (2) referred to lines involved in intrastate communication then the clauses would be completely useless because the Communications Act specifically states that it shall not apply to intrastate communication. See Sec. 2(b)(1).

Clause (1) of the first proviso states that no certificate shall be required for "a line within a single State unless such line constitutes part of an interstate line". In other words, clause (1) says that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes part of an interstate line.

Now what is meant by the term "interstate line"? If it means a line engaged in interstate communication, as some contend, clause (1) would then say that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes a part of interstate communication. Such an interpretation of "interstate line" destroys the efficacy of the proviso's clause (1) because the opening clause of Section 214 would have accomplished precisely that without any assistance from clause (1) as so construed.

However, if the term "interstate line" means simply what it says—a line crossing a state boundary—clause (1) of the first proviso is then rendered intelligible. It means then that an interstate communication line physically located entirely within a single state is exempt from Commission certification simply because the state commission is fully competent to regulate a line located entirely within its jurisdiction. On the other hand, if the line is a part of a line crossing a state boundary, two or more states are involved and Commission certification is imposed to avoid the possibility of state regulatory conflicts.

Any other definition of "interstate line" would emasculate clause (1).

Furthermore, it is clear that the word "line" as used in Section 214 and as used in its forebearer, Section 1 (18-22) of the Interstate Commerce Act, means the line of a common carrier. The basic purpose of a Section 214 type provision is to prevent the uneconomic duplication of the physical facilities of common carriers.

Section 214 only applies to common carriers and all lines referred to therein must be certificated by the Commission unless exempted.

The Commission determined, on the basis of CATV systems being engaged in interstate communications, that such communications constitute a "line"which begins at a television broadcast station in one state and ends in another state where the broadcast signals are picked up by the antenna of a CATV operator and distributed to its customers through common carrier provided channel service facilities located entirely within the receiving state. This determination is fallacious because the broadcast link in such interstate communication does not constitute part of an "interstate line" within the meaning of Section 214. This is so for three reasons.

First, the broadcasting of television signals does not create a "line" as that term is commonly understood. Second, the broadcaster is not a common carrier nor is it subject to Section 214. See Sec. 3(h). Third, if the broadcasting of television signals created an "interstate line", then such broadcasting would have to be certificated under Section 214 like any other "line".

A further fallacy in the reasoning of the Commission is illustrated by its tacking the signal of a non-common carrier television broadcaster to the single State lines of a common carrier in order to produce an "interstate line" supposedly within the meaning of Section 214. The illegitimacy of such tacking has been recognized previously by the Commission and by this Court in several decisions involving analogous situations.

In *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958), the Commission, in holding that it lacked jurisdiction to regulate CATV systems as common carriers under Title II, properly expressed doubts as to its jurisdiction over common carrier lines used to furnish CATV distribution service, saying:

> *... Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation,* nor could the Commission limit the period of time in which such systems could continue in operation. For example, common carriers are not required to obtain any certification or other authorization under Section 214(a) of the Act to construct

or operate "local, branch, or terminal lines not exceeding ten miles in length."[6] ...

[6]Even if held to be common carriers, it is also debatable whether most CATV systems would be subject to the provisions of Title II of the Communications Act inasmuch as the physical facilities of most systems are situated within a single State. Notwithstanding that such systems may pick up and distribute television signals and programs originating in other States, there is substantial question whether their operations could be construed to involve interstate common carriage. See Pennsylvania R.R. Co. v. P.U.C. of Ohio, 298 U.S. 170." (24 FCC at 255) (Emphasis supplied.)

The Commission's reference in its above-quoted opinion in the *Frontier Broadcasting Co.* case to the *Pennsylvania R.R.* case constituted recognition of the legal rule that interstate lines of non-common carriers cannot be combined with common carrier lines within a state in order to bring the latter within a statutory provision, which, as does Section 214(a) of the Communications Act, regulates only interstate lines of common carrier.

In *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio,* 298 U.S. 170, 80 L.Ed. 1130 (1936), a coal company, after mining coal in Pennsylvania and transporting it by barges between points in Pennsylvania, transported the coal over its own railroad from Pennsylvania to its plant in Ohio. There the coal was washed, broken, assorted and then shipped by common carrier railroad to other points in Ohio. The Supreme Court ruled that the carriage by the common carrier railroad within Ohio was not subject to regulation by the Interstate Commerce Commission under Part I of the Interstate Commerce Act (from which Part II of the Communications Act was derived).[8]

[8] See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 2 (1934); H.R. Rep, No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 3 (1934).

Speaking for the Court Mr. Justice Cardozo declared:

"The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper.

"Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit .... But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. *The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission.* The Interstate Commerce Act (49 U.S.C. §1 *et seq.*) is aimed at common carriers exclusively, § 1(1), (3), and not even at all these.... Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property ... wholly within one State and not shipped to or from a foreign country from or to any place in the United States.'

§1(2)(a), (b). . . . And 'wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier."' §1(3).

"With the aid of these definitions the problem before us takes on a new simplicity. . . . The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. *Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process.* . . .

"*Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt.* Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in

need of expansion, it is for the legislative department of the government to determine how great the change shall be." (298 U.S. at 173-77). (Emphasis supplied.)[9]

The rationale of the above decision has been followed in cases specifically involving the question whether a certificate was required for the construction of a line. *Pennsylvania R.R. v. Pittsburgh, L. & W. R.R.*, 83 F.2d 861 (6th Cir. 1936), *cert. denied*, 299 U.S. 572; *New York Cent. R.R. v. Southern Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd*, 338 F.2d 667, *cert. denied*, 380 U.S. 954, *rehearing denied*, 381 U.S. 907. These cases hold that for purposes of Section 1(18) of the Interstate Commerce Act, which, like Section 214(a), deals with certificates for the construction of lines, noncommon carrier lines cannot be combined with common carrier lines to bring a line under certificate requirements.

The above cases under the Interstate Commerce Act are directly in point.[10] These cases support the conclu-

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[9] In the recent case of *Pennsylvania R.R. v. United States*, 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd.*, 382 U.S. 368, 372, *rehearing denied*, 382 U.S. 914 (1966), Mr. Justice Cardozo's opinion in *Pennsylvania R.R. v. Ohio P.U.C.*, *supra*, was approved and followed in holding that the Interstate Commerce Commission did not have jurisdiction over intrastate transportation by for-hire motor carriers under Part II of the Interstate Commerce Act, where goods had moved or would move to or from points outside the state by private motor carriers.

[10] Section 1(18) of the Interstate Commerce Act, which requires a certificate of convenience and necessity for the construction or extension of a line of a railroad, is one of the provisions from which Section 214 of the Communications Act was derived. See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 6 (1934); 78 Cong. Rec. 8824 (May 15, 1934); 78 Cong. Rec. 10314 (June 2, 1934). (Cont'd)

sion that the telephone companies, in providing their CATV channel service, are not using lines which constitute "part of an interstate line." The noncommon carrier broadcast signal, even if it could be considered a "line," could not properly be combined with a common carrier's CATV distribution line located wholly within one state to constitute an "interstate line" under Section 214(a).

We believe that these considerations plainly demonstrate that common carrier provided CATV channel service facilities, which are located entirely within a single state, are exempt from Commission certification under clause (1) of the first proviso.

B. CATV Channel Service Facilities Not Exceeding Ten Miles in Length

Clause (2) of the first proviso of Section 214(a) provides that no certificate shall be required for the construction, acquisition or operation of "local, branch, or terminal lines not exceeding ten miles in length." In other words, clause (2) exempts from Commission certification local, branch or terminal lines engaged in interstate or foreign communication, even if actually crossing a state boundary, if they do not exceed ten miles in length.

The Commission, however, although recognizing that "the legislative history sheds little light on the subject," nevertheless concluded that "the exemption is intended to apply to minor additions or improvements to existing facilities or services and the expenditure involved is ordinarily small."(A. 48, par. 21).

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10 (Cont'd)
Although there are specific differences between the two acts in the coverage of the certificate requirements, these differences are not pertinent to the concept of what is an interstate line of a common carrier under Section 214(a).

The first difficulty with the Commission's position, however, is that the statute refers to "local, branch, or terminal" lines. It makes no mention of "additions" or "improvements," whether or not facilities were pre-existing, or how much they cost. Ordinarily, interpretations of a statute as far afield from the plain meaning of the statutory language have some basis in the legislative history. Yet the Commission claims that the legislative history "sheds little light" on the meaning of the terms at issue.

The Commission, without citation of any apposite authority, characterizes the facilities as " 'main' communication lines" requiring "substantial outlays of funds." (A. 48, par. 22). There is no justification for such a holding.

The plain meaning of a local line is one confined to the geographical area involved here. It was such a line that the Congress intended the States to regulate irrespective of its "importance" or "cost." The Commission has baldly adopted a criterion which Congress did not prescribe or intend. It is difficult to conclude anything else but that the Commission has engaged in the most tortured construction in seeking to destroy the very clear exemption of such lines from its jurisdiction.

If the facilities at issue here, which, in general, are not only located within a single state, but also within a single telephone exchange area, are not "local" in character then the term is simply rendered meaningless. The local telephone exchange area,[11] is an area which Congress has committed to state and local regulation under Section 221(b) of the Act.

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[11] "Telephone exchange service" is defined by Section 3(r).

The Senate and House Committees, in reporting S. 3285, a bill proposing the Communications Act of 1934, both stated that Section 221(b) was inserted to "conform to recommendations of the State commissions and will enable those commissions, when authorized to do so, to regulate exchange services in metropolitan areas overlapping State lines.[12]

The witnesses for the NARUC and the state commissions characterized service within exchange areas as being local and primarily of state concern. For example, NARUC General Solicitor Benton, in testifying before the Senate Committee on Interstate Commerce on March 15, 1934, stated that:

> . . . The Federal Government is the only Government that can regulate interstate toll rates. The Federal Government should accordingly have full and effective powers of regulation as to those.
>
> On the other hand, exchange service is local. There is no reason why people having complaints about their exchange service or rates should be compelled to carry their complaints to Washington. Such service is subject to State regulation. Even though it passes over State lines, by reason of its local character, the State where the service is delivered may regulate. This the United States Supreme Court held very clearly in the *Pennsylvania Gas Co.* case. (252 U.S. 23).[13]

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[12] Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, 73d Cong., 2d Sess., p. 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, 73d Cong., 2d Session, p. 7.

[13] Hearing Record on S. 2910, p. 180, 5th par.

And NARUC First Vice President McDonald of Wisconsin, in testifying on March 14th before the same Committee, stated that:

> We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over matters of purely State concern, such as so-called exchange or local rates of telephone companies.[14]

McDonald made the same statement on May 9, 1934, in testimony before the House Committee on Interstate and Foreign Commerce.[15]

NARUC General Solicitor Benton, in testifying before the same House Committee on May 9th, stated that:

> Section 221(b) recognizes the local character of exchange service, even though to some patrons of a particular exchange, the service may be rendered across State lines. Taking advantage of the rule laid down in the *Pennsylvania Gas Co. v. Public Service Commission of New York*, (252 U.S. 23), which holds that in the case of such local service, a State may regulate where Congress does not regulate; exchange service is left, by section 221, to the exclusive regulation of the State, where the State has made provision for regulation by a State commission.[16]

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[14] *Id.*, p. 156, 2d par.

[15] Hearing Record on H.R. 8301, p. 132, 4th par.

[16] *Id.*, p. 137, 2d par.

Furthermore, the Commission in the *Frontier Broadcasting Company* case (1958), 24 FCC 251, which held that CATV systems are not common carriers under the Act, stated that:

> . . . Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation, nor could the Commission limit the period of time in which such systems could continue in operation. *For example, common carriers are not required to obtain any certification or other authorization under Section 214(a) of the Act to construct or operate "local, branch, or terminal lines not exceeding ten miles in length."* . . . (Page 255).

These quotations clearly indicate that Congress and the Commission have characterized service within a local exchange as being local in nature.

Accordingly, we believe that the CATV lines in issue here are plainly "local" because in general they are not only located within a single State, but are also within a single telephone exchange area—an area which Congress has committed to State and local regulation under Section 221(b) of the Act even in instances when exchange services in metropolitan areas overlap State lines.

For example, the very large Washington metropolitan exchange area encompasses the District of Columbia and parts of Maryland and Virginia and calls therein are subject exclusively to State and local regulation. The dimensions of the exchange area are measured by the distance you can call without incurring a toll charge.

Obviously, service rendered within this exchange area or in any other is "local" within the meaning of the Communications Act.

The relationship between the national volumes of "local" and "toll" calls is revealed by a publication entitled "Statistics of Communications Common Carriers" issued by the Commission for the year ended December 31, 1966, pages 16-17, of which the Court may take judicial notice. This publication—the latest issue of its kind—reveals that during 1966 there were 134,058,911,000 "local" calls and 6,646,954,000 "toll" calls. Since all of the local calls, and that portion of the toll calls which were intrastate, are subject to State and local regulation, it is obvious that the telephone business in the Nation is predominantly "local" within the meaning of the Communications Act.

Furthermore, in fully considering the relationship between the words "main" and "local" we must evaluate the relative importance of CATV service and telephone exchange service to the average subscriber.

A subscriber in the Washington metropolitan exchange area, upon acquiring CATV service for his television set, would receive a clearer picture of the TV programs he now receives and would also receive programs from distant television stations if permitted by the Commission. Supposedly, the entertainment he receives from his TV set would be enhanced.

On the other hand, the communications service which the telephone subscriber receives in the Washington metropolitan exchange area is virtually indispensable in today's society. Not only can he talk with his friends and business associates, but he can call a doctor if he or a member of his family requires emergency medical attention. He can call the police if he is threatened with

bodily harm or otherwise requires protection. He can call the fire department to report a fire.

If a subscriber in the Washington metropolitan exchange area or in any other had to choose between the Commission's so-called "main" line CATV service or his "local" telephone service, which would he choose? Which is the most important to his personal and business life?

CATV service is not a "main" line service as the Commission would have us believe, but rather a service of far less importance to the public than local telephone exchange service.

The Commission says it should have jurisdiction over CATV lines because they carry interstate signals. This is irrelevant under the language of the exemption. In contrast, the local telephone exchange service is an integral part of the national and international toll network and yet it is reserved exclusively for State and local regulation. It is the gateway to the toll network and without it the toll network would be worthless.

The latest recognition of the local character of CATV service is reflected by the decision of a Three Judge Federal District Court in Nevada issued on December 2, 1968, in *TV Pix, Inc. v. Taylor, et al.*, ____ F. Supp. ____, Civil Action No. 1814. In this decision, the Court upheld a State statute empowering the Nevada Public Service Commission to regulate CATV companies as public utilities. The statute was unsuccessfully challenged on the grounds: that it imposed an unconstitutional burden on interstate commerce; that Congress had preempted the field of television communications; and that the statute deprived the plaintiff of its property without due process of law.

In upholding State regulation the Court stated that:

> . . . the apparatus of the community antenna

> system is an appendage to the primary interstate broadcasting facilities with incidents much more local than national, involving cable equipment through the public streets and ways, local franchises, local intrastate advertising and selling of services and local intrastate collections. In this perspective, a community antenna system is essentially a local business and, in its impact on interstate commerce, is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee. . .

The Commission next contends that CATV lines are not "local" lines because they require "substantial outlays of funds." As noted above, the language of Section 214(a)(2) makes no reference to cost.

Nevertheless, it is helpful, in analyzing the validity of the Commission's contention, to also place the element of cost in its proper perspective.

The Commission stated in its brief below, p. 8, that "the record shows the investment cost of the then extant Bell channel service facilities to be $43,240,019.00." This is apparently an indication of the "substantial outlay of funds" the Commission has in mind. (See also A. 11).

The Statistics of Communications Common Carriers, referred to above, reports at page 33 that the total net communications plant of the Bell System is $30,765,568,524.00. The Commission in an Interim Decision and Order issued on July 5, 1967, in *Re American Telephone and Telegraph Company et al.*, 70 PUR 3d 129, at page 145, par. 21, stated that "In terms of plant investment and revenues, the interstate and foreign service of the Bell System respondents account for about

25 per cent of their total operations." In paragraph 22, page 146, of the same case, the Commission states that the net plant investment of Bell devoted to interstate and foreign services is $8,606,209,000.00.

Comparing these figures together, we see that approximately 22 billion dollars of the Bell plant is subject to State and local regulation and approximately 8½ billion dollars is subject to Commission regulation.

For the Commission to seek to hang its jurisdiction in this case on an insignificant 43 million dollar investment by Bell in CATV lines is ludicrous to say the least in view of the total Bell investment and the division of regulatory responsibility.

Finally, the Commission contends that CATV service is significantly different from that theretofore provided and that, consequently, this new service does not fall within the 214(a)(2) exemption regarding "local" lines. The plain meaning of the language of the 214(a)(2) exemption makes no reference to the kind of service afforded by the "local" lines.

Furthermore, the Commission's newly invented "new service" theory for Section 214 certification was not applied when common carriers long ago provided similar new services to television and radio broadcasters, nor was it applied in the transmission of data.

In view of this consideration, we believe that any common carrier provided CATV channel service facility not exceeding ten miles in length is exempt from Commission certification under clause (2) even if it crosses a state boundary.

C. Commission Inability to Certificate Non-Common Carrier Provided CATV Channel Service Facilities

Another consideration militating against Commission certification of common carrier provided CATV channel service facilities is the inability of the Commission to certificate channel service facilities provided by CATV operators who are not common carriers.

The certificate requirements of Section 214 only apply to "carriers", which term is defined by Section 3(h) of the Act as follows:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The Commission has consistently held that CATV systems are not common carriers within the meaning of Section 3(h) and, hence, do not come within the provisions of Title II applicable to carriers. *Second CATV Report and Order* (1966), 2 FCC 2d 732 (17); *Frontier Broadcasting Company* (1958), 24 FCC 251; *CATV and TV Repeater Services*, 26 FCC 403, 427-428; and *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. See also *United States v. Southwestern Cable Company*, 392 U.S. 157, 169, ftn. 29, 20 L. Ed.2d 1001, 1011, ftn. 29 (1968).

Obviously, Congress intended when it enacted Section 214 and its forebearer, Section 1 (18-22) of the Interstate Commerce Act, that only Commission regulated carriers would be constructing the "lines" referred to

therein. The purpose of Section 214 was recognized by the Commission in the Order below (A. 44, par. 16) in the following terms:

> Manifestly, Congress intended by Section 214 to confer upon the Commission broad supervisory control over construction by communications common carriers in order to insure that such construction would not be inconsistent with the public interest; *e.g.*, not wasteful or unnecessary. *Mackay Radio and Telegraph Company*, 6 FCC 562 (1938). As the Supreme Court stated in construing and applying comparable language in the Interstate Commerce Act[17]" . . . the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public . . . ."

[17] *Texas & Pacific Railway Company v. Gulf, Colorado & Sante Fe Railway Company*, 270 U.S. 266, 277 (1926).

However, the Commission simply cannot carry out the Congressional intent within the context of the subject matter of this case. To hold Section 214 certification requirements applicable to common carrier provided CATV channel service facilities, would mean that the Commission could only exercise jurisdiction over a fraction of the subject matter. Any common carrier line certificated by the Commission could later be paralleled by a CATV system operator, thereby rendering certification pointless and causing a consequent "waste of resources."

The regulatory purpose reflected by Section 214 logically presupposes that the regulatory body shall have jurisdiction over the construction of *all* lines. Otherwise,

it cannot prevent the uneconomic duplication of facilities.

The regulatory concept of 214 cannot be rationally applied in the manner attempted by the Commission.

CONCLUSION

This Court in *Davies Warehouse Company v. Bowles,*[17] reaffirmed one of the basic tenets of our federal system of government when it said:

> Local institutions, customs, and policies, will not be overriden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "'the extension of federal control into these

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[17] 321 U.S. 144, 154, 88 L. Ed. 635, 642, r. col., 2d par. (1944).

> traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' "

In the light of this philosophy and for the foregoing reasons, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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